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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 571-572

ARTHUR T. HORMANN,

Petitioner,

vs.

THE NORTHERN TRUST COMPANY, a corporation, JOHN RUSSELL TANNER, WILBUR CLARK TANNER, ANNA E. TANNER, THEODORE W. TANNER and EMILY TANNER PEARSON,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

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Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the United States Circuit Court of Appeals For the Seventh Circuit.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Arthur T. Hormann complains of the decree and opinion of the United States Circuit Court of Appeals for the

Seventh Circuit, dated July 10, 1940, reported 114 F2d (Advance Sheets) 118, entered in a certain cause pending therein entitled *Arthur T. Hormann* v. *The Northern Trust Company, et al.*, Nos. 7254-7255, reversing the decree of the United States District Court for the Northern District of Illinois, Eastern Division, in favor of petitioner (R. 84), and respectfully petitions for a writ of certiorari to review the same as against The Northern Trust Company and Anna E. Tanner, Theodore W. Tanner and Emily Tanner Pearson, respondents.

A

JURISDICTION OF THIS COURT.

This application for a writ of certiorari is made under subdivision (a) Section 240 of the Judicial Code (28 U.S.C.A., Section 347). The suit was to decide the ownership of a fund. The decision of the Circuit Court of Appeals is final.

B

SUMMARY STATEMENT OF MATTERS INVOLVED.

Petitioner, one of the heirs of Sarah De Loss, deceased, sued The Northern Trust Company, individually and as trustee under her will, for one-half of the corpus of a trust created thereby, after the termination of the trust upon the death of the last life tenant on March 27, 1939. Respondents Anna E. Tanner et al. intervened, claiming the one-half of the corpus claimed by petitioner. Respondents John Russell Tanner et al. intervened claiming the other one-half of the corpus. A hearing was had in open court; an opinion was filed finding that petitioner was entitled to the half claimed (R. 59), and a final decree was entered February

15, 1940, in conformity with such opinion (R. 84).

An appeal, without supersedeas, was taken by respondents Anna E. Tanner et al., on a record consisting solely of the pleadings, (R. 2, 8, 13-23, 35-38, 42-59), opinion of the court (R. 59-64), findings of fact and conclusions of law (R. 71-84) and the final decree (R. 84-86); respondent The Northern Trust Company moved to enter a supplemental decree (R. 88-89) and, when the motion was denied, appealed with supersedeas (R. 113) on a like record.

When the case was docketed in the Circuit Court of Appeals, petitioner moved on March 20, 1940, (R. 133) to dismiss the appeal of respondents Anna E. Tanner et al. or affirm the decree as to them, the motion being based on the following grounds (R. 135):

> "1. That it appears in and by the record filed herein, both from the findings of fact (R. 71, line 26), and from the decision of the court (R. 60, 61), that evidence was taken and heard in open court in support of the contentions of this appellee (petitioner), and was considered by the court in reaching its decision.
>
> "2. That such evidence was not preserved in a Certificate of Evidence or otherwise.
>
> "3. That, as a matter of law, the only question before the court is the regularity of the judgment roll and the conformance of the decree (R. 84) to the Findings of Fact and Conclusions of Law (R. 71 *et seq.*) all of which are complete and sufficient in all respects, * * *"

The motion to dismiss or affirm was denied without prejudice to petitioner's right to renew the same at the hearing of the cause on the merits (R. 164).

At the argument, the court below proceeded to retry the questions of fact, reversing the decree, and although petitioner's motion to dismiss or affirm was renewed, this

motion was denied by the court with the following comments (R. 174):

> "Appellee Hormann filed a motion in this court asking us to dismiss the appeal, or in the alternative to affirm the decree. In explanation of our refusal to dismiss the appeal, it is fair to say that this phase of the motion was based on the fact that appellants had not incorporated in the record the transcript of all of the testimony. It is obvious from the court's memorandum and from the motion itself, that this refers to certain testimony, not divulged, calculated to show the facts and circumstances surrounding the testatrix at the time she made her will. So far as we are informed there was no further testimony offered. It was received subject to appellants' objections, and afterwards the court sustained the objections, and no exceptions were saved to that ruling. Under these circumstances, we think the error, if any, must have been the court's ruling in sustaining the objections to the evidence, and that question is not presented, nor is the proffered evidence before us. Moreover, the rule provides that it shall be applied under conditions named, unless other contexts of the *will* clearly disclose a different intention. We do not understand that this provision can be extended to include outside circumstances and statements, even those of the testatrix, in order to avoid the rule. The entire will is before us, and that would seem to be sufficient."

The court then reviewed the trial court's decision of ultimate fact (R. 81), that it was the testatrix' intention that on the death of the life tenant one-half the fund should go to petitioner, and held, instead, that the fund should go to respondents Anna E. Tanner et al.

C

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The case presents questions of public importance, since the judgment of the Circuit Court of Appeals in denying petitioner's motion to dismiss is in square conflict with all other cases of like nature in the Federal courts. The rule, as stated in petitioner's motion to dismiss (R. 135), quoted above, is that the only question before a reviewing court on a "strict record" is the regularity of the judgment roll and the conformance of the decree to the pleadings, findings of fact, and conclusions of law. The leading decisions establishing the conflict are set out in the appended brief. (See Point II, Argument.)

2. The case presents further questions of public importance in that, for the first time in the history of the appellate review in the United States, the opinion of a trial court has been substituted for a certificate of evidence, in the absence of the latter from the record, to determine the nature of evidence offered. It has always been the rule that, while the opinion of the trial court is informative of that court's reasoning, it may not be used as a substitute for an omitted certificate of evidence. The result of the court's decision and judgment is a square conflict with the cases set out in subdivision V of the appended brief and argument (See Point V, Argument).

3. The case presents a square conflict in action with *Perry* v. *Wiggins*, (C. C. A. 8), 57 F2d 622, 625. The court below held "The entire will is before us, and that would seem to be sufficient" (R. 174). In *Perry* v. *Wiggins*, 57 F2d 622, the Eighth Circuit refused review, even though the entire will was before it. (See Point I, Argument).

4. The case presents further questions of public importance since it squarely raises questions which have not previously been decided by the Supreme Court, in spite of the long history of our jurisprudence. The questions raised concern the duty of a successful appellee in preparing a record for review. The well-considered Eighth Circuit case of *Pulaski-Lonoke Drainage Dist.* v. *Missouri Pacific R. Co.*, 44 F2d 899, states the rule, at page 901,

> "It is the duty of the appellant to see that the evidence, if any, is in the record, or by appropriate action to show that no evidence was offered or received."

In the instant case, the Circuit Court of Appeals has stated,

> "It (the evidence) was received subject to appellants' objections, and afterwards the court sustained the objections, and no exceptions were saved to that ruling. Under these circumstances, we think the error, if any, must have been the court's ruling in sustaining the objections to the evidence, and that question is not presented, nor is the proffered evidence before us."

These remarks are tantamount to requiring a successful appellee to participate actively in the preparation of a certificate of evidence and record with the burden of added expense which such activity would occasion.

If it be the duty of the successful appellee to see that the record is complete, rather than the duty of the appellant as the Eighth Circuit has indicated, it would be well for the profession and the litigating public to be so informed of such rule by an authoritative decision of this court (See Point IV, Argument).

5. The case presents the following question of importance which has not clearly been passed upon by the Supreme Court: Can a court decide factual questions adversely to an appellee on a "strict record" or "record

proper," which includes no certificate of evidence? (See Point I, Argument.)

6. The court has fallen into grievous error and is in conflict with *Perry* v. *Wiggins,* (C. C. A. 8), 57 F2d 622, in assuming the ascertainment of a testator's intention is a question of law. The disposition of property under a will is a question of ultimate fact (*Perry* v. *Wiggins,* 57 F2d 622). Decisions on questions of fact cannot be reviewed on a "strict record" or "record proper" (See Points I and II, Argument).

7. The questions involved in this case are further of public importance because the Circuit Court of Appeals has disregarded the established precept that a decree must be affirmed if it is right for any reason (See Point VI, Argument).

8. On a crucial point of the case, the court below has assumed the law of Illinois to be that legacies to a descendant of a testator lapse if the legatee dies before the testator. The law, as exemplified by statute, (Ill. Rev. Stat. 1939, Ch. 3, Sec. 200), is exactly contra. (See Point VII, Argument). While such a decision may not amount to a denial of due process of law, it is very close to the line, and should call for the exercise of the Supreme Court's power of supervision.

9. The opinion of the Circuit Court of Appeals will create confusion since it indicates the necessity of saving exceptions to rulings, when the use of exceptions was abolished after September 1, 1938, by Rule 46 of the Rules of Civil Procedure. This case was filed after such rules went into effect.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Seventh Circuit, commanding said court

to certify and send to this court, on a day designated, for its review and determination, a full and complete transcript of the record and all proceedings in the United States Circuit Court of Appeals for the Seventh Circuit had in said cause, to the end that said cause may be reviewed and determined by this court, as provided by law, and that the judgment of the United States Circuit Court of Appeals for the Seventh Circuit, reversing the decree of the United States District Court for the Northern District of Illinois, Eastern Division, may be reversed, and that your petitioner may have such other and further relief in the premises as to this court will seem meet and just.

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